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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PLEASANT VALLEY HOSPITAL, INC., and
PLEASANT VALLEY HOME MEDICAL
EQUIPMENT, INC.,
Petitioners,

v.

M & M MEDICAL SUPPLIES AND SERVICE, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI WAS TIMELY AS IT WAS FILED WITHIN 90 DAYS AFTER THE FOURTH CIRCUIT'S DENIAL OF PETITIONERS' PETITION FOR REHEARING

Rule 40(a) of the Federal Rules of Appellate Procedure ("Rule 40(a)") was designed to permit reconsideration of a case where a court has overlooked or misapprehended points of law or fact.[1] The Petition for Rehearing

[1] It makes little sense to argue, as Respondent does, that a petition for rehearing of an en banc decision must be addressed to a panel of the court, and there is nothing in *Missouri v. Jenkins*, 110 S.Ct. 1651, 1661 (1990), that holds to the contrary. That case deals with a request for reconsideration of a decision of a panel of the circuit court, not a request for reconsideration of a decision of the court sitting en banc. Rule 40(a), by its terms, does not

filed by Petitioners was designed to do precisely that. Indeed, it is explicitly described as a Petition for Rehearing under Rule 40(a).[2] Appendix A to Response Brief in Opposition to Petition for Writ of Certiroari ("Resp. App.") at 2a. Moreover, even the most cursory examination of the issues presented by the Petition for Rehearing indicates that the focus of the Petition was the issues of fact and law overlooked by the en banc majority.[3] *Id.*

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limit petitions for rehearing to the reconsideration of panel decisions. Clearly, there is every reason to believe that Rule 40(a) encompasses situations where the en banc majority has overlooked material facts or points of law.

[2] The words "en banc" were included in the title of the Petition for Rehearing only because it is obvious that a panel of the circuit could not reconsider an initial en banc determination by the court. Yet, there can be no doubt that the purpose of the petition was to focus on points of law and fact which were overlooked by the en banc majority in its decision. Appendix A to Response Brief in Opposition to Petition for Writ of Certiorari ("Resp. App.") at 2a. This is precisely what Rule 40(a) is designed to do. *See* Fed. R. App. P. 40(a).

[3] In contrast, a suggestion for rehearing en banc is granted only where consideration by the full court is necessary to secure or maintain uniformity of the court's decisions, or when the proceeding involves a question of exceptional importance. *See* Fed. R. App. P. 35(a). Almost by definition, these reasons would rarely be applicable where the initial decision is one by the court sitting en banc, rather than a decision of a panel of the court. Any en banc decision is controlling within a circuit, and conflicts between en banc decisions within a circuit are far less likely to occur than conflicts between panel decisions within the circuit. Of course, en banc decisions are likely to involve matters of exceptional importance, indeed, that may well explain why the issues were considered en banc by the court in the first instance. However, in a case, such as this, which already has been decided by the court sitting en banc, the importance of the issue, by itself, hardly justifies en banc reconsideration of that issue, unless the en banc majority initially has overlooked important points of law or fact. But such matters are addressed under Rule 40, not Rule 35.

Similarly, there can be no doubt that the court of appeals treated the Petition as one for rehearing under Rule 40, rather than as a suggestion for rehearing en banc under Rule 35 of the Federal Rules of Appellate Procedure ("Rule 35"). Indeed, the circuit court's January 22, 1993 Order denying the Petition for Rehearing explicitly states "the appellees' *petition for rehearing* in banc was submitted to this Court," and concludes that "IT IS ADJUDGED AND ORDERED that the *petition for rehearing* in banc is denied." Appendix E to the Petition for a Writ of Certiorari ("Appendix") at 58a (emphasis added) (all capitals in original).

Moreover, it is in itself determinative that the Fourth Circuit's mandate was issued on January 29, 1993, exactly seven days after the circuit court denied the Petition for Rehearing. Rule 41(a) of the Federal Rules of Appellate Procedure ("Rule 41(a)") provides that

> [t]he timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the *mandate shall issue 7 days after entry of the order denying the petition* unless the time is shortened or enlarged by order.

Fed. R. App. P. 41(a) (emphasis added). In contrast, if the Fourth Circuit had treated the Petition for Rehearing as a suggestion for rehearing en banc, the court would have been obliged by Rule 41(a) to issue its mandate within 21 days after the en banc decision, which was rendered on December 9, 1992, rather than seven days after the denial of the Petition for Rehearing. Fed. R. App. P. 41(a). This Court has held that the failure of a court of appeals to issue a mandate within 21 days of its decision indicates that the court intended to treat even an ambiguous rehearing request as a petition for rehearing within the meaning of Rule 40(a), rather than as a suggestion for rehearing en banc pursuant to Rule 35(a). *Missouri v. Jenkins*, 110 S. Ct. 1651, 1661 (1990).

In arguing that the Fourth Circuit Court of Appeals intended to treat the Petition for Rehearing as a "sugges-

tion for rehearing in banc", Respondent argues that "Judge Butzner, the only senior circuit judge on the in banc panel, was not permitted to vote on whether to rehear the case." Response Brief in Opposition to Petition for Writ of Certiorari ("Response") at 7.[4] However, the fact that Judge Butzner did not vote on the Petition for Rehearing is hardly probative. Indeed, it is arguable that under the applicable statute, circuit courts of appeal may not permit senior circuit judges to participate in a vote to decide whether the en banc court will rehear a case. The authority of circuit courts of appeal to grant hearings and rehearings en banc is governed by 28 U.S.C. § 46(c). That section provides, in pertinent part, that cases are to be heard by panels of not more than three Judges "unless a hearing or rehearing before the court in banc is *ordered by a majority of the circuit judges of the circuit who are in regular active service.*" *Id.* (emphasis added). Although this Court has never held that senior circuit judges may not decide whether an en banc decision of a circuit court should be reconsidered, it did instruct the Fourth Circuit, in a somewhat different context, that "the language of the present statute [28 U.S.C. § 46(c)] thus confines the power to order a rehearing in banc to those circuit judges *who are in 'regular active service.'*" *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (1974) (emphasis added).[5]

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[4] In fact, the Fourth Circuit's January 22, 1993 Order does not say that Judge Butzner was not permitted to vote. Appendix E at 58a. Rather, it say only that the Petition for Rehearing "was submitted to this Court." *Id.* In addition, while the Order does not list Judge Butzner as casting a vote on the issue of rehearing, it does indicate that the Order denying the Petition for Rehearing was entered at the "direction of Judge Butzner." *Id.*

[5] Nor can the Respondent derive significance from the fact that a poll of the court was requested. Appendix E at 58a. Indeed, the Order states only that a poll was requested, not that such a poll was required. *Id.* In any event, it probably would be permissible for the Fourth Circuit to determine that a poll must be requested before a vote will be taken on a petition for rehearing

In sum, there can be no dispute that Petitioners intended to treat the Petition for Rehearing as a petition pursuant to Rule 40(a). Indeed, the petition itself so states. Resp. App. A at 2a. Moreover, there can be no doubt that the Fourth Circuit Court of Appeals, itself, viewed the Petition as one for rehearing under Rule 40. Under these circumstances, it is clear that "the time for filing the petition for a writ of certiroari . . . runs from the date of the denial of the petition for rehearing . . . ." Sup. Ct. R. 13.4.[6]

II. THERE IS A CLEAR CONFLICT BETWEEN THE RULE 56(e) STANDARD APPLIED BY OTHER CIRCUITS AND THAT APPLIED BY THE FOURTH CIRCUIT TO DR. BLAIR'S AFFIDAVIT

In addressing the issue of whether there is a conflict among the circuits regarding the proper standard to be

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of an en banc decision of the court. As this Court has stated, in a different context,

> [w]e hold that the statute is simply a grant of power to order hearings and rehearings *en banc* and to establish the procedure governing the exercise of that power. We hold that litigants are given no *statutory* right to compel each member of the court to give formal consideration to an application for a rehearing *en banc*.

Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247, 267 (1953) (emphasis in original).

[6] Even if the Court were to conclude that the court of appeals was incorrect in treating the Petition for Rehearing as one under Rule 40, any Justice of this Court may grant a 60-day extension of time for the filing of a petition for a writ of certiorari "for good cause shown." 28 U.S.C. § 2101(c). Certainly, the Petitioners' justifiable reliance on the court of appeals' action constitutes good cause. Admittedly, this Court's Rules require an application for an extension of time to be presented during the initial 90-day period. Sup. Ct. R. 30.2. However, the statute does not limit the power of any Justice of the Court to grant, sua sponte, an extension to file a petition for a writ of certiorari. *See* 28 U.S.C. § 2101(c). Given Petitioners' reliance on the court of appeals' treatment of the Petition for Rehearing, there is a clear basis for such action.

applied to expert affidavits under Rule 56(e) of the Federal Rules of Civil Procedure ("Rule 56(e)"), Respondent either misapprehends or seeks to obscure the clear distinction which exists between "underlying facts" (which need not be supplied by the expert under Rule 705 of the Federal Rules of Evidence ("Rule 705")), and "specific facts" (which must be supplied by the expert to support the validity of an affidavit under Rule 56(e)). The conflict among the circuits lies in the disharmony that exists with regard to the precise meaning of these terms. What some courts call "underlying facts" are clearly seen by others to be "specific facts." Moreover, the converse is also true.

All of the cases cited by the en banc majority, as well as the en banc majority decision itself, treat the "specific facts" which form the basis of the expert's opinion, and the "reasoning" (or methodology) applied by the expert as constituting "underlying facts." *See* Appendix A at 6a-10a; *Ambrosini v. Labarraque*, 966 F.2d 1464, 1470-71 (D.C. Cir. 1992); *Monks v. General Elec. Co.*, 919 F.2d 1189, 1192 (6th Cir. 1990); *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1316-18 (9th Cir. 1985). Under the standard in these cases, neither the specific factual basis of the opinion, nor the reasoning (or methodology) applied by the expert is seen as essential to the validity of an expert's affidavit. Rather, it is sufficient for an expert merely to identify or enumerate the broad "rubrics," or types of data or facts considered.

In stark contrast to this approach, other circuits have been explicit and, indeed, unequivocal in requiring experts to furnish the specific factual and methodological bases upon which they rest their conclusions. For these courts, the "specific facts" required by Rule 56(e) are quite distinct from "underlying facts" that need not be provided under Rule 705. While the "underlying facts" (which consist of the "raw data" analyzed by the expert) need not be provided, the specific facts derived,

through analysis, from the underlying data, must be provided to satisfy Rule 56(e). In addition, there is also a clear and explicit conflict among the circuits with regard to whether Rule 56(e) requires experts to provide the "reasoning" or methodology applied in reaching their conclusions. *Compare Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989); *Evers v. GMC*, 770 F.2d 948, 986-87 (11th Cir. 1985); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977) *with Bulthuis*, 789 F.2d at 1318.

III. THE ISSUE OF WHETHER DR. BLAIR RELIED ON FACTS OF THE TYPE REASONABLY RELIED UPON BY ECONOMIC EXPERTS IS NOT A NOVEL ISSUE IN THIS CASE

Respondent's statement that "this [Petition for a Writ of Certiorari] is the first time that this issue has arisen in the five year history of the case" is simply untrue. Response at 14. Respondent asserts that

> Petitioners never mentioned it [the issue of Dr. Blair's reliance on facts not of the type relied upon by economic experts] in . . . their brief in support of their petition for rehearing of the panel opinion, in their brief in support of their 'Petition for Rehearing en banc,' in any of their supplemental briefs, or in any of their oral arguments.

Id. However, Petitioners treat this issue in the Petition for Rehearing en banc explicitly, and at length, and include much of the relevant case law cited to by this Court. Indeed, the Petition for Rehearing is itself included as an Appendix to the Respondent's Response. *See* Resp. App. A at 3a-4a, nn. 1 & 2, 4a, 6a-11a. The fact that Petitioners previously raised the issue must have been known to Respondent.

In the Petition for Rehearing, Petitioners state that "[a]s an expert, Dr. Blair was required to support his expert opinions by reliance on facts of a type relied on by economic experts." *Id.* at 4a. While the case law cita-

tions in prior briefs are less inclusive, the essential cases are cited to and discussed in earlier briefs as well, including Petitioner's Petition for Rehearing, and Suggestion for Rehearing En Banc; and Petitioners' Reply to Respondent's Opposition to that Petition.

IV. THERE IS A CONFLICT BETWEEN THE FOURTH CIRCUIT'S OPINION AND THIS COURT'S DECISION IN *SPECTRUM SPORTS*

Even a cursory reading of Petitioners' arguments reveals the conflict between the approach taken by the Fourth Circuit and that established by this Court, in *Spectrum Sports, Inc. v. McQuillan,* 113 S. Ct. 884 (1993), regarding the appropriate standard to determine a dangerous probability of success. Petitioners do not argue that the en banc majority has done away with the dangerous probability of success element of attempted monopolization. *See* Petition for a Writ of Ceriorari at 21-23. Rather, Petitioners argue that the Fourth Circuit's standard impermissibly permits the existence of market power to be determined by factors unrelated to market power.

The en banc majority stated that

> [m]arket share is relevant, but its relevance is tempered by evidence of the other two elements of the claim. Compelling evidence of an intent to monopolize or of anticompetitive conduct reduces the level of market share that need be shown.

Appendix A at 15a. Respondent itself concedes that "Petitioners correctly point out that market share is but a surrogate or proxy for the existence of monopoly or market power." Response at 17. Thus, it is clear that the Fourth Circuit's standard permits the amount of evidence required to establish a dangerous probability of monopolization to be determined by the amount of evidence regarding factors unrelated to the existence of monopoly or market power. Such a standard is clearly in-

consistent with this Court's holding in *Spectrum Sports*, 113 S. Ct. at 889-92.[7]

V. THE FOURTH CIRCUIT DECISION FORCES PETITIONERS TO A TRIAL ON THE ISSUE OF MONOPOLY LEVERAGING

The en banc majority did accept the existence of monopoly leveraging as a separate violation of Section 2 of the Sherman Act for purposes of trial, thereby implicitly rejecting the position taken by this Court in *Spectrum Sports*, 113 S. Ct. at 889-92, and the decisions of two other circuits. The en banc court stated that it would

> assume for purposes of remand that monopoly leveraging is a separate violation of section 2. There will be time enough to evaluate the validity of this assumption after the parties have developed a *factual* record.

Appendix A at 16a (emphasis added). However, the question of whether monopoly leveraging is a separate and cognizable cause of action under the antitrust laws is a question of law, not a question of fact. The district court squarely addressed the issue of the existence of monopoly leveraging as a separate and cognizable cause of action in holding that

> Section 2 of the Sherman Act clearly does not provide a cause of action for conduct so denominated [i.e., monopoly leveraging]. The Plaintiff's allegations of leveraging merely state a claim for attempted monopolization.

Appendix C at 51a. Consequently, the en banc majority should have reviewed the district court's conclusion. If

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[7] Because *Spectrum Sports* was decided on January 25, 1993, the en banc court could not have considered it. However, the existence, and significance of the case were pointed out. *See, e.g.*, Resp. App. A at 11a-12a, n.13.

the district court was correct, Petitioners should not be put to the expense of trial on the issue.[8]

CONCLUSION

In its Response, Respondent has put forward no valid arguments in opposition to this Court granting a Writ of Certiorari in this case.

For the foregoing reasons, Petitioners respectfully submit that the reasons put forward by Petitioners in favor of a grant of certiorari remain valid and compelling, and request that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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[8] There is no doubt that the scope of trial would be expanded by a claim for monopoly leveraging. Such a claim, for the first time, would put at issue the question of the relevant geographic market for hospital services, and the existence (or non-existence) of Petitioner Pleasant Valley Hospital's monopoly power in that market.